SUPREME COURT, U. S.
MAY 4 1972

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1431

HARVEST BRAND, INC., (Now by Substitution
HARVEST INDUSTRIES, INC.),
Petitioner,

v.

A. E. STALEY MANUFACTURING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit

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**To the United States Court of Appeals
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Harvest Brand, Inc., your petitioner, and defendant-appellee below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on December 2, 1971.

OPINIONS BELOW

The District Court opinion holding Respondent's patent invalid (App. p. A-1) was not published. The Tenth Circuit Opinion reversing the trial court (one judge dissenting), entered December 2, 1971, appears in Appendix page A-19, at 452 F.2d 735, and at 171 USPQ 795. A motion was granted December 16, 1971, to extend the time to December 30, 1971, for filing a Petition for Rehearing. The Pe-

tition for rehearing, filed December 29, 1971 (App. p. A-34) was denied February 4, 1972.

Jurisdiction in this court derives from 28 USC 1254(1). Jurisdiction of the District Court rests on 28 USC 1338(a).

QUESTIONS PRESENTED FOR REVIEW

Did not the two judges of the Court of Appeals (one judge dissenting) improperly reverse the district court and improperly hold valid the Staley patent on a trivial change in the recipe for a feed block for stock, all ingredients of which recipe had previously been used in feed blocks for the same purposes, thereby levying tribute from the defendant, potentially from other feed producers, from stock farmers, and ultimately increasing the price of meat:

> Especially as the appellate court undertook an independent examination of the recorded evidence and made its own "findings of fact" without the benefit of observing the witnesses, abruptly reversing findings of fact of the trial court, in a technical patent case that took a week to try with testimony of seven witnesses and a large number of exhibits,
>
> And especially as the "findings" of the appellate court were clearly contrary to the evidence, and indeed were simply not true,
>
> And especially as under the new appellate rules, as appellee-petitioner was not permitted the time of argument nor the length of brief both (1) to support the findings of the trial court and (2) to explain the multitude of erroneous statements in the brief of appellant (here respondent) necessarily posing a dilemma in which Petitioner, having to choose, elected to support the findings of the trial court, inevitably leaving many of the misstatements of the appellant's brief not specifically answered.

STATUTES INVOLVED.

35 USC 282: "* * * the following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded: * * * (2) Invalidity of the patent or any claim in suit on any grounds specified in part II of this title as a condition for patentability * * *."

35 USC 102: "A person shall be entitled to a patent unless—(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, * * *".

35 U.S.C. 103: "* * * A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

STATEMENT OF FACTS

The patent claims a recipe for cattle feed blocks which are an old form of cattle feed. The recipe here consists essentially of dehydrated molasses, salt in sufficient quantity to control consumption, and a binder. Dependent claims include the addition of the drug phenothiazine to the block. Another claim involves simply putting such a

block in the field for cattle to eat, this latter being what the farmer does.

According to the patent the block for the patent may contain other materials such as protein feed and the like, so long as the amount of molasses exceeds a so-called "fifty percent molasses equivalent." No particular meaning was attached to this percentage.

Dehydrated molasses blocks of over 50% molasses equivalent were old, with and without phenothiazine. Using salt to control consumption of molasses was old. Incorporating salt to control consumption in protein feed blocks was old, with and without phenothiazine. The patentee's advertising stated that the patentee had derived the idea of using salt to control the consumption of the molasses block from the former practice in the art of using salt to control consumption of protein blocks. Incorporating salt to control consumption in a block containing molasses and protein, was old in the Arizona paper, this being the same combination as appears in the patent claims save only that in the Arizona cube the protein content was larger and the molasses content was smaller than the amount specified in the patent. The only claim of novelty thereover resided in the designation in plaintiff's recipe that the amount of molasses be in at least fifty percent molasses equivalent.

With the foregoing, the trial court, after a week's trial and full briefing by both parties, held claims 1-9 of the patent invalid, it being held obvious and unpatentable under 35 USC 103, to make a high-molasses, low-protein block with salt to control consumption instead of a low-molasses, high-protein block also with salt to control consumption, with or without phenothiazine. It held claim 1 of the patent anticipated, which purported to patent the method of blocking the product, which was simply the old

method of putting the ingredients in a blocking machine and compressing them into the shape of a block.

It held claim 11, for a method of feeding the blocks to cattle which would render farmers infringers, to be directly anticipated under 35 USC 102, since the method steps were identical to the usual practice of feeding feed blocks to stock by putting the blocks in the field where the stock could get to them.

The Court of Appeals reviewed the facts de novo, and over the dissent of one judge, held to the contrary, as if the District Court opinion had not existed. As we shall show hereafter, the Court of Appeals set forth as a basis for its opinion certain things said by it to be facts disregarded by the trial court **which actually were not true facts at all.**

REASONS FOR GRANTING THE WRIT

We do not ask this court simply to reverse an ordinary law suit. The case involves a broader problem rendered acute by the new appellate court rules.

The recently promulgated rules of appellate procedure limit the brief of an appellee to fifty pages and his argument to thirty minutes (RAP 28(g), 34(b)). For over twenty years FRCP 52 (a) had said "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." And for an equal length of time this had been disregarded too frequently by appellate courts. But when the new short appeal briefs and arguments were insisted upon by the 1968 appellate rules, it became virtually necessary that findings of fact be upheld for the simple reason that the parties are not allowed time or space to present all of the

evidence and background to every fact, and to recreate in the Court of Appeals the climate out of which these findings had emerged in the trial court. **No adequate day in court can now be had on a full set of findings of fact considered de novo in an appellate court.**

This very situation existed here. The trial court did make extensive findings and did reject arguments, did specify witnesses whom he credited over other witnesses. When respondent here, appellant there, filed its brief on appeal, it disregarded the record and the evidence and made a multitude of statements which, to say the least, were inaccurate. The Court of Appeals believed the appellant instead of the trial court, and wrote an opinion not only disregarding the trial court's findings of fact, but making its own "findings" **which are just not true.**

This was a technical case which took a week to try, and the findings were extensive. Because of the limitation of time and space under the new appellate rules, we, as appellee, were confronted in preparing our brief on appeal with the choice between, on the one hand, supporting the findings of fact of the trial court, and, on the other hand, demonstrating the error in the multitude of statements in the appellant's brief. Perhaps naively we relied on FRCP 52(a), believing that if the findings of the trial court were shown to be supported by proper evidence, they would be followed in the Court of Appeals, and that it should not be essential to attack each of the large number of factual errors in the statements in the appellant's brief. Certainly the new appellate rules afford neither time nor space to point them all out.

There is, therefore, serious need to have reliable guidelines for this kind of situation. How should an appellee present his argument? Can he really rely upon Rule 52(a), and argue the findings are supported by the abundance of evidence? Or is he faced with the hazard that find-

ings of fact may be as casually disregarded as they were in this case and rewritten by the Court of Appeals. District Court judges are asking why, in a case likely to go to appeal as do most patent cases, they should even bother to gestate and deliver findings of fact. If findings may be so cavalierly disregarded, the fifty-page, thirty-minute rule simply denies justice, because it denies all possibility of a complete consideration of the issues.

We can illustrate briefly some of the factual errors in the appeal decision. These are for illustration, as more are set forth in the Petition for Rehearing and Supplement thereto in the Appendix (App. pp. A-34 through A-58).

The court of appeals indicated that there was great weight of evidence reflecting "failures and drawbacks of the prior art in accomplishing the novel result achieved through the Staley patent". This argument of the patentee had been made and rejected below. It is contrary to the facts.

To illustrate, the Court said, "Protein and mineral blocks were designed to fill a particular need not necessarily connected with the functions of a molasses salt block. As a carrier of medicines they were failures because they were not palatable enough to cattle to hide the taste of the medicines and their consumption was too variable." This precise argument was rejected by the trial court, because it is untrue. Protein blocks are **still being sold**, still contain medicines and still have salt to control the consumption thereof. And the Staley Company advertised that salt was used **successfully** to control consumption of protein blocks, and that its use to control consumption of molasses blocks was derived from the use of salt to control consumption of protein blocks. Respondent Staley's molasses block advertisement said (App. II, 69):

"Extensive feeding tests showed that this product is so highly palatable that it is necessary to add salt as an aid in regulating consumption at the proper low, optimum rate. High levels of salt (as high as 33%) are being used successfully and economically in controlling the consumption rate of protein blocks under many feeding conditions. Now, the concept of using salt has been extended to controlling of a high level molasses block."

Furthermore, the molasses block of the patent does not control consumption of the medicines, in any different degree from other blocks. True, the plaintiff so alleged and the Court of Appeals accepted as true, **although the trial court rejected this very same argument as untrue.** Other "findings" of the Court of Appeals to the effect that there were failures in the prior art, are equally contrary to the evidence, and to the findings of the district court.

The Court of Appeals "found" that "the evidence proves that cattle develop a tolerance for salt which they like. This can eventually lead to salt poisoning." This is contrary to the very documents that plaintiff relied on in urging the point, and was specifically rejected by the trial court.

The Court of Appeals "found" that Harvest Brand's history belied its statement that the prior art taught one to mix molasses, salt and oil, saying that Harvest Brand had made 100 blocks in 1958, claiming them successful, yet later made blocks of an infringing type (the only difference was the presence of salt in the later blocks).

This kind of distortion of fact by an appellate court is very frustrating. The 100 blocks of 1958 were mentioned during testimony at the trial only to show that blocking dehydrated molasses had been successfully performed in 1958, several years ahead of Staley's patent. The episode

was this: a customer sent Harvest Brand dehydrated molasses to see if Harvest Brand could block it. Harvest Brand blocked it successfully and sent the blocks back to the customer. That is all. It is very dangerous for an appellate court to make findings of fact because that court cannot perceive their context, meaning, or relative weight.

The trial court expressly accepted the testimony of defendant's expert Burns over that of plaintiff's expert Bartley. The Court of Appeals astonishingly reversed on this expressed issue of credibility. How can one create the conditions of credibility of one witness and lack of credibility of the other in the Court of Appeals? It certainly cannot be done in thirty minutes and fifty pages.

As for the technical problems involved, the Court of Appeals said that Staley's expert (whom the trial court had rejected) "and a Harvest Brand witness opined, one would expect serious weathering problems in a block containing salt and molasses. Another witness for Harvest Brand stated that since salt and molasses have different characteristics, one would expect problems during the blocking process." The truth is that there never were any problems in blocking the molasses blocks with salt, and there was **no such testimony** by any witness for Harvest Brand.

Contrary to the "finding" of the court of appeals, blocking the molasses blocks not only presented no problem, but was not originated by Staley. Staley itself had simply sent its mixture down to a professional blocker, and actually knew nothing about the blocking other than the fact that the blocker sent the product back duly blocked. Harvest Brand never had any trouble blocking these materials. The Court of Appeals has confused the record because Harvest Brand's blocker was at one time asked to block dehydrated molasses without any binder. This could not be done, so he did what he always did with

blocking materials. He added a conventional binder and the blocking was thereupon done with no trouble. The trial court heard the testimony and understood this. In fifty pages and thirty minutes there is no chance of explaining factual details like that so that the Court of Appeals can avoid mistaking them.

It is not necessary to multiply the disturbingly long list of erroneous statements in the Court of Appeals opinion. The very basis of facts upon which that court based its reversal of the trial court was untrue. The erroneous "findings" of the appellate court point up very graphically the reason for the rule that Findings of Fact should be secure against such complete disregard by the Court of Appeals.

There is a crying need for some guidelines for patent cases in connection with the stability of findings of fact. At least let us get rid of the trap for the unwary litigant who happens to have believed Federal Rule 52(a) and happens to have believed that the short-shift justice to be produced under the fifty-page, thirty-minute rule in appellate courts, necessarily intended to emphasize Rule 52(a).

It is possible to limit appellate courts to specific legal issues or even an occasional finding of fact which is clearly erroneous. But to upset a whole decision, completely rewriting the findings of fact, completely throwing out all of the findings by the trial court, and rendering its laborious decision a work of sheer futility and a total waste of time, should not be sanctioned if Rule 52(a) and if the fifty-page, thirty-minute rules are to have any meaning. Certainly otherwise justice is impossible.

In addition to the interest of all litigants and courts in stability of the rules of procedure, there is here also the ever-present public interest in a patent adjudicated valid. In this case, public interest is simply in the price of meat

and milk. With farm labor at a premium and costly, farmers have tended to go to the self-feeding of animals, an art which has been developing in the past twenty years. The Staley company, which makes molasses, now can monopolize its use in high-molasses blocks with salt added for self-feeding control. This, we submit, should not be permitted on a patent that differs from the prior art only in the adjustment of the proportions of ingredients in the food recipe for the blocks, which produces no function not known in the prior art.

One other point, which is a corollary to the above, is the need for further guidelines in patent cases involving 35 USC 103. The first guidelines were promulgated by the Court in **Graham v. Deere**, 383 US 1, wherein it was stated that the trial court should find, among other things, the "differences between the prior art and the claims at issue." In the present case, therefore, we forthrightly asserted to the courts below that the particular proportions of ingredients of the recipe in the claims in suit were not shown by any specific item of the prior art, although they were shown in comparable contexts. Such candor may be a mistake, unless this court will declare clearly to the lower courts that by following the instruction of **Graham v. Deere**, a litigant does not admit patentability by admitting novelty. The quoted phrase from **Graham** theoretically requires the litigant to state, as an issue, what is assertedly different from and was disclosed in prior art, so that the court interpreting 35 USC 103 can deal specifically with whether or not that difference is patentable. But there is now great danger in a defendant's being thus forthright, for in admitting that there are "differences between the subject matter sought to be patented and the prior art," the defendant opens the possibility that the court will equate the admission of novelty with a quasi confession of patentability. This Court needs to instruct lower courts that the admission of

novelty, required by this court in **Graham**, is inevitable in a Section 103 defense, and **must not be equated with any confession of patentability**. Otherwise, no attorney can afford to be so candid as to admit novelty, but must perform the usual obfuscation to avoid suggesting to the court a path toward a holding of validity.

This unfortunate situation can be overcome by some very clear instructions from this court on the subject, explaining why the concession of novelty, pursuant to **Graham v. Deere**, must not be taken as a concession of patentability.

For these reasons, we believe that the Petition should here be granted.

Respectfully submitted

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